

CHAPTER 7

COURT-MARTIAL TRIALS

Trial procedures differ according to the type of court convened to hear the case. Summary courts-martial (SCM) are convened to try relatively minor offenses and they use a simple form of procedure. Special courts-martial (SPCM) try serious offenses that are deemed to be beyond the scope of an SCM but not serious enough to warrant trial by general courts-martial (GCM). The major differences in these types of courts-martial are the maximum punishments that each may adjudge and the manner in which you prepare the records of proceedings.

This chapter examines the types of courts-martial, the procedures each uses, and other procedural matters that occur before and during trial. In our discussion of trial procedures, it is necessary to treat the SCM separately because its procedures are much different from those of the SPCM and GCM.

THE SUMMARY COURT-MARTIAL

An SCM is the least formal of the three types of courts-martial and the least protective of individual rights. The SCM is a streamlined trial process involving only one officer who performs the duties of prosecutor, defense counsel, judge, and members. The purpose of this type of court-martial is to dispose of relatively minor offenses. The one officer assigned to perform the various roles must inquire thoroughly and impartially into the matter concerned to make sure both the United States and the accused receive a fair hearing. The SCM is a streamlined procedure that provides less protection of the rights of the accused than other forms of court-martial. The maximum imposable punishment that an SCM can award is very limited. Furthermore, it may try only enlisted personnel who consent to be tried by SCM.

As the SCM has no civilian equivalent, it is strictly a creature of statute within the military system. While it is a criminal proceeding at which the technical rules of evidence apply and at which a finding of guilty can result in loss of liberty and property, there is no constitutional right to representation by counsel. Therefore, it is not a truly adversarial proceeding.

CREATION OF THE SUMMARY COURT-MARTIAL

An SCM is convened (created) by an individual authorized by law to convene an SCM. Article 24, *Uniform Code of Military Justice* (UCMJ); *Rules for Courts-Martial* (R.C.M.) 1302a, *Manual for Courts-Martial* (MCM), 1984; and *Manual of the Judge Advocate General* (JAGMAN) 0120c identify those persons who have the power to convene an SCM. These individuals include any person who may convene a GCM or an SPCM; or the commanding officer (CO) or officer in charge (OIC) of any other command when empowered by the Secretary of the Navy (SECNAV).

The authority to convene an SCM rests in the office of the authorized command vice in the person of its commander. For example, Captain Doe, U.S. Navy, has SCM convening authority while performing his or her duties as Commanding Officer, USS *Mississippi*. When Captain Doe goes on leave or is absent from his or her command for other reasons, he or she loses his or her authority. The power to convene an SCM is nondelegable and in no event can a subordinate exercise such authority "by direction." When Captain Doe is on leave from his or her ship, his or her authority to convene an SCM passes to his or her temporary successor in command (usually the executive officer) who, in the eyes of the law, becomes the acting CO.

COs or OICs not empowered to convene an SCM may request such authority by following the procedures contained in the JAGMAN.

Restrictions on Authority to Convene

Unlike the authority to impose nonjudicial punishment (NJP), a competent superior commander may restrict the power to convene SCMs. Furthermore, the commander of a unit attached to a ship should, as a matter of policy, refrain from exercising his or her SCM convening powers. He or she should refer such cases to the CO of the ship for disposition while the unit is embarked. This policy does not apply to commanders of units that are embarked for transportation

only. When an individual has already been tried by a state or foreign court, you must obtain permission from the officer exercising general court-martial jurisdiction (OEGCMJ) before imposition of NJP or referral to an SCM. Offenses that have already been tried in a court deriving its authority from the United States (such as U.S. District Courts) may not be tried by court-martial.

If the convening authority (CA) or SCM officer is the accuser, it is discretionary with the CA as to whether to forward the charges to a superior with a recommendation to convene the SCM or convene the court himself or herself. If the SCM officer is the accuser, the jurisdiction of the SCM is not affected.

Mechanics of Convening

Before bringing any case before an SCM, you must properly convene the court. You create an SCM by the order of the CA detailing the SCM officer to the court. The convening order will specify that it is an SCM and appoint the SCM officer. Additionally, the convening order may designate where the court-martial will meet. If the CA derives his or her power from designation by SECNAV, include this information in the order. Each convening order is assigned a court-martial convening order number. The CA personally signs the convening order showing his or her name, grade, and title, including organization and unit.

The MCM, 1984, authorizes the CA to convene an SCM by notation on the charge sheet signed by the CA. However, the better practice is to use a separate convening order for this purpose. Appendix 6b of the MCM, 1984, contains a suggested format for the SCM convening order. Also discussed in chapter 6 is the proper preparation of a convening order.

Summary Court-Martial Officer

An SCM is a one-officer court-martial. As a jurisdictional prerequisite, this officer must be a commissioned officer on active duty and of the same armed force as the accused. (The Navy and Marine Corps are part of the same armed forces—the naval service.) Where possible, the officer's grade should not be below O-3. The SCM officer should be qualified because of age, education, experience, and judicial temperament as his or her performance will have a direct impact upon the morale and discipline of the command. Where more than one commissioned officer is

present within the command or unit, the CA may not serve as SCM officer. When the CA is the only commissioned officer in the unit, however, he or she may serve as SCM officer. Note this fact in the convening order and attach it to the record of trial. If such a situation exists, the better practice is to appoint an SCM officer from outside the command. The SCM officer does not have to be from the same command as the accused.

The SCM officer assumes the burden of prosecution, defense, judge, and jury. He or she must thoroughly and impartially inquire into both sides of the matter making sure the interests of both the government and the accused are safeguarded and justice is done. While the SCM officer may seek advice from a judge advocate or legal officer on questions of law, he or she may not seek advice from anyone on questions of fact, since he or she has an independent duty to make these determinations.

Jurisdictional Limitations-Persons

Article 20, UCMJ, and R.C.M. 1301(c) provide that an SCM has the power (jurisdiction) to try only (how enlisted person who consent to trial by SCM. The right of an enlisted accused to refuse trial by SCM is absolute. Commissioned officers, warrant officers, cadets, aviation cadets, and midshipmen, or persons who are not subject to the UCMJ, may not be tried by SCM.

Jurisdictional Limitations-Offense

An SCM has the power to try all offenses described in the UCMJ except those for which a mandatory punishment beyond the maximum imposable at an SCM is prescribed by the UCMJ. An SCM cannot try capital offenses that involve the death penalty. Refer to R.C.M. 1004 for a discussion of capital offenses. You may dispose of any minor offense by an SCM.

PREFERRAL AND REFERRAL OF CHARGES

In this section, we will focus on the mechanism for properly preparing a particular case for trial before an SCM. Referral is the basic process by which you send a case to a particular type of court-martial.

Preliminary Inquiry

Every court-martial case begins with a complaint by someone that a person subject to the UCMJ has committed an offense that results in the discovery of misconduct. The officer exercising immediate NJP authority over the accused has the duty to make, or cause to be made, an inquiry into the truth of the complaint or apparent wrongdoing.

Preferral of Charges

Charges are formally made against an accused when signed and sworn to by a person subject to the UCMJ. This procedure is known as preferral of charges. You prefer charges by executing the appropriate portions of the charge sheet. There are several steps involved in this preferral process. These steps include the following:

1. Personal data—Complete part I of page 1 of the charge sheet first. You can find the information relating to personal data in the pertinent portions of the accused's service record.

2. The charges—Next, you complete part II of page 1 of the charge sheet indicating the precise misconduct involved in the case. Each punitive article found in part IV, MCM, 1984, contains sample specifications. If the charges are so numerous that they will not all fit in part II, place them on a separate piece of paper and refer to it as attachment A. The preparation of charges and specifications were dealt with in detail in chapter 6.

3. Accuser—The accuser is a person subject to the UCMJ who signs item 11 in part III at the bottom of page 1 of the charge sheet. The accuser swears to the truth of the charges and has the affidavit executed before an officer authorized to administer oaths. This step is important, as an accused has a right to refuse trial on unsworn charges.

4. Oath—The oath must be administered to the accuser and the affidavit shows that it was executed by a person with proper authority. Article 136, UCMJ, authorizes commissioned officers who are judge advocates, staff judge advocates (SJAs), legal officers, law specialists, SCM officers, adjutants, and Marine Corps and Navy commanding officers, among others, to administer oaths for this purpose. Also authorized to administer oaths are officers certified by the Judge Advocate General of the Navy as counsel under Article 27, UCMJ, all officers in paygrade O-4 and above, executive officers, and administrative officers of Ma-

rine Corps aircraft squadrons. Often the legal officer will administer the oath regardless of who conducted the preliminary inquiry. When the charges are signed and sworn to, they are preferred against the accused.

Informing the Accused

The next step that you take is to inform the accused of the charges against him or her. The purpose of this step is to provide an accused with reasonable notice of impending criminal prosecution. This action is in compliance with the criminal due process of law standards. The immediate commander of the accused is required to have the accused informed as soon as possible of the following elements: (1) the charges preferred against him or her; (2) the name of the person who preferred the charges; and (3) the name of the person who ordered the charges to be preferred.

The person who gives notice to the accused executes block 12 at the top of page 2 of the charge sheet. If not the immediate commander of the accused, the person signing on the signature line should state his or her rank, component, and authority. The law does not require a formal hearing to provide notice to the accused, but the charge sheet must show that notice was given.

When the accused is absent without leave at the time charges are sworn, it is permissible and proper to execute the receipt certification even though the accused cannot be advised of the existence of the charges. In such cases, attach a statement indicating the reason for the lack of notice to the case file. When the accused returns to military control, the notice should then be given.

Once formal charges have been signed and sworn to, the preferral process is complete. The preferred charges are then receipted for by the officer exercising SCM jurisdiction over the accused. This officer or his or her designee may formally receipt for the preferred charges. The purpose of this receipt certification is to stop the running of the statute of limitations for the offense charged. The receipt section, part IV of the charge sheet, is filled in now.

The Act of Referral

Once the charge sheet and the supporting materials are presented to the SCM CA and he or she decides to refer the case to an SCM, he or she must send the case to one of the SCMs previously convened. You complete this procedure by means of completing

block 14 in part V on page 2 of the charge sheet. The referral is executed personally by the CA. It explicitly details the type of court to which the case is being referred (SCM, SPCM, GCM) and the specific court to which the case is being referred.

A court-martial can only hear a case properly referred to it. The simplest and most accurate way to describe the correct court is to use the serial number and date of the order creating that court. Thus, the referral might read "referred for trial to the summary court-martial appointed by my summary court-martial convening order 1-CY dated 17 July 19CY." This language precisely identifies a particular kind of court-martial and the particular SCM to try the case.

In addition, the referral on page 2 of the charge sheet should show any particular instructions applicable to the case. These instructions could include statements such as confinement is not an authorized punishment in this case or any other instructions desired by the CA. If no instructions apply to the particular case, the referral should so indicate by use of the word *None* in the appropriate blank. Once the referral is properly executed, the case is referred to trial. Send the case file to the proper SCM officer for further action.

PRETRIAL PREPARATION

After charges are referred to trial by SCM, and all case materials are sent to the proper SCM officer, he or she is responsible for preparing the case for trial.

Preliminary Preparation

Upon receipt of the charges and accompanying papers, the SCM officer begins preparation for trial. The charge sheet is carefully examined, and all obvious administrative, clerical, and typographical errors are corrected. The SCM officer initials each correction he or she makes on the charge sheet. If there are so many errors as to require preparation of a new charge sheet, reswearing of the charges and re-referral are required. If the SCM officer changes an existing specification to include any new person, offense, or matter not fairly included in the original specification, the new specification must be resworn and re-referred. The SCM officer continues with his or her examination of the charge sheet to determine the correctness and completeness of the information on pages 1 and 2.

Pretrial Conference With the Accused

After initial review of the court-martial file, the SCM officer meets with the accused in a pretrial conference. This section discusses the accused's right to counsel later in this chapter. If the accused elects representation by counsel, all dealings with the accused are through his or her counsel. Thus, the accused's counsel, if any, should be invited to attend the pretrial conference. At the pretrial conference, the SCM officer follows the suggested guide found in appendix 9, MCM, 1984, and documents the fact that all applicable rights were explained to the accused. This is done by completing blocks 4 and 5 on the Record of Trial by Summary Court-Martial, DD Form 2329.

Purpose

The purpose of the pretrial conference is to provide the accused with information on the nature of the court-martial, the procedure to be used, and his or her rights with respect to that procedure. No attempt should be made by the SCM officer to interrogate the accused or otherwise discuss the merits of the charges. The proper time to deal with the merits of the accusations against the accused is at trial. The SCM officer provides the accused with a meaningful and thorough briefing so the accused fully understands the court-martial process and his or her rights pertaining to that process.

Advice to Accused—Rights

The SCM officer advises the accused of the following matters:

- The general nature of the charges
- The fact that the charges have been referred to an SCM for trial and the date of referral
- The identity of the CA
- The name of the accuser
- The name of the witnesses who could be called to testify and any documents or physical evidence that the SCM officer expects to introduce into evidence
- The accused's right to inspect the allied papers and immediately available personnel records
- That during the trial the SCM officer will not consider any matters including statements previously made by the accused to the officer detailed as SCM

unless they are admitted according to the Military Rules of Evidence

- The right to plead not guilty or guilty
- The right to cross-examine witnesses and have the SCM officer cross-examine witnesses on behalf of the accused
- The right to call witnesses and produce evidence with the assistance of the SCM officer, if necessary
- The right to testify on the merits or to remain silent with the assurance that no adverse inference will be drawn by the SCM officer for such silence
- If any findings of guilty are announced, the right to remain silent, to make an unsworn statement, oral or written or both, to testify, and to introduce evidence in extenuation and mitigation
- The right to object to trial by SCM
- The maximum sentence that the SCM officer may adjudge if found guilty of the offense(s) alleged

The maximum punishment at a SCM includes the following:

E-4 and below—The jurisdictional maximum sentence that an SCM may adjudge in the case of an accused who, at the time of trial is in paygrade E-4 or below, extends to (1) reduction to the lowest paygrade (E-1); (2) forfeiture of two-thirds of 1 month's pay (CA may apportion collection over no more than 3 months); (3) a fine not to exceed two-thirds of 1 month's pay; (4) confinement not to exceed 1 month; (5) hard labor without confinement not to exceed 45 days (instead of confinement); and (6) restriction to specified limits for 2 months. If the accused is attached to or embarked in a vessel and is in paygrade E-3 or below, he or she may be sentenced to serve 3 days' confinement on bread and water/diminished rations and 24 days' confinement instead of 30 days' confinement.

E-5 and above—The jurisdictional maximum that an SCM could impose in the case of an accused who, at the time of trial is in paygrade E-5 or above, extends to (1) reduction, but only to the next inferior paygrade; (2) restriction to specified limits for 2 months; and (3) forfeiture of two-thirds of 1 month's pay. Unlike NJP, where an E-4 may be reduced to E-3 and then awarded restraint punishments impossible only upon an E-3 or below, at SCM, an E-5 cannot be sentenced to confinement or hard labor without

confinement even if a reduction to E-4 has also been adjudged.

Advice to Accused Regarding Counsel

While the MCM, 1984, created no statutory right to detailed military defense counsel at an SCM, the CA may still permit the presence of such counsel if the accused can obtain such counsel. However, the MCM, 1984, has created a limited right to civilian defense counsel at SCMs. The accused has a right to hire a civilian lawyer and have that lawyer appear at trial, if such appearance will not necessarily delay the proceedings and if military exigencies do not prevent it. The accused must, however, bear the expense involved. If the accused wishes to retain civilian counsel, the SCM officer should allow him or her a reasonable time to do so.

An accused has no right to military counsel at an SCM. However, if an accused was not given an opportunity to consult with counsel before accepting an SCM, the SCM will be inadmissible at a later trial by court-martial. The term *independent counsel* means a lawyer qualified within the meaning of Article 27(b), UCMJ, who, in the course of regular duties, does not act as the principal legal advisor to the CA.

To be admissible at a later trial by court-martial, evidence of an SCM at which an accused was not actually represented by counsel must affirmatively demonstrate that:

- the accused was advised of his or her right to confer with counsel before deciding to accept trial by SCM;
- the accused either exercised his or her right to confer with counsel or made a voluntary, knowing, and intelligent waiver; and
- the accused voluntarily, knowingly, and intelligently waived his or her right to refuse an SCM.

If an accused has been properly advised of his or her right to consult with counsel and to refuse an SCM, his or her elections and/or waiver in this regard are made in writing and are signed by the accused. Use a form similar to that shown in figure 7-1 to record the advice/waiver. It should be made on a page 13 of the accused's service record with a copy attached to the record of trial. The Acknowledgement of Rights and Waiver, properly completed, contains all the necessary advice to an accused. When it is properly executed, it will establish a voluntary, knowing,

SUMMARY COURT-MARTIAL
ACKNOWLEDGEMENT OF RIGHTS AND WAIVER

I, _____,
assigned to _____,
acknowledge the following facts and rights regarding summary courts-martial:

1. I have the right to consult with a lawyer prior to deciding whether to accept or refuse trial by summary court-martial. Should I desire to consult with counsel, I understand that a military lawyer may be made available to advise me, free of charge, or, in the alternative, I may consult with a civilian lawyer at my own expense.

2. I realize that I may refuse trial by summary court-martial, in which event the commanding officer may refer the charge(s) to a special court-martial. My rights at a summary court-martial would include:

- a. the right to confront and cross-examine all witnesses against me;
- b. the right to plead not guilty and the right to remain silent, thus placing upon the government the burden of proving my guilt beyond a reasonable doubt;
- c. the right to have the summary court-martial call, or subpoena, witnesses to testify in my behalf;
- d. the right, if found guilty, to present matters which may mitigate the offense or demonstrate extenuating circumstances as to why I committed the offense(s); and
- e. the right to be represented at trial by a civilian lawyer provided by me at my own expense, if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it.

3. I understand that the maximum punishment which may be imposed at a summary court-martial is:

On E-4 and below

Confinement for 1 month

45 days' hard labor without confinement

60 days' restriction

Forfeiture of two-thirds pay for 1 month

Reduction to the lowest paygrade

On E-5 and above

60 days' restriction

Forfeiture of two-thirds pay for 1 month

Reduction to next inferior paygrade

Figure 7-1.—Summary court-martial acknowledgement of rights and waiver.

4. Should I refuse trial by summary court-martial, the commanding officer may refer the charge(s) to trial by special court-martial. At a special court-martial, in addition to those rights set forth above with respect to a summary court-martial, I would also have the following rights:

a. The right to be represented at trial by a military lawyer, free of charge, including a military lawyer of my own selection if he or she is reasonably available. I would also have the right to be represented by a civilian lawyer at my own expense.

b. The right to be tried by a special court-martial composed of at least three officers as members or, at my request, at least one-third of the court members would be enlisted personnel. If tried by a court-martial with members, two-thirds of the members, voting by secret written ballot, would have to agree in any finding of guilty, and two-thirds of the members would also have to agree on any sentence to be imposed should I be found guilty.

c. The right to request trial by military judge alone. If tried by a military judge alone, the military judge alone would determine my guilt or innocence and, if found guilty, he or she alone would determine the sentence.

5. I understand that the maximum punishment which can be imposed at a special court-martial for the offense(s) presently charged against me is:

discharge from the naval service with a bad-conduct discharge (delete if inappropriate);

confinement for _____ months;

forfeiture of two-thirds pay per month for _____ months;

reduction to the lowest enlisted paygrade (E-1).

Knowing and understanding my rights as set forth above, I (do) (do not) desire to consult with counsel before deciding whether to accept trial by summary court-martial.

Knowing and understanding my rights as set forth above (and having first consulted with counsel), I hereby (consent) (object) to trial by summary court-martial.

Signature of accused and date

Signature of witness and date

Figure 7-1.-Summary court-martial acknowledgement of rights and waiver—Continued.

and intelligent waiver of the accused's right to consult with counsel and/or his or her right to refuse trial by an SCM. Assuming Booker warnings have been given (proper advice and recordation of election/waivers), evidence of the SCM will be admissible at a later trial by court-martial as evidence of the character of the accused's prior service.

Final Pretrial Preparation

After the pretrial interview, the SCM officer determines whether the accused has decided to accept or refuse trial by SCM. If the accused needs more time to decide, it should be provided. If the case is to proceed, the witnesses or the description of other evidence that the accused wishes presented at trial should be identified. The SCM officer arranges for a time and place to hold the open session of the trial. These arrangements are made through the legal officer, and the SCM officer notifies all personnel involved of the time and place of the first meeting.

The SCM officer plans an orderly trial procedure to include a chronological presentation of the facts. Appendix 9, MCM, is an SCM trial guide. The SCM officer should follow it closely and precisely during the hearing. The admissibility and authenticity of all known evidentiary matters are determined and numbers are assigned to all exhibits to be offered at trial. The evidence reviewed by the SCM officer includes not only that contained in the original file, but also any other relevant evidence discovered by other means. The SCM officer has the duty of making sure all relevant and competent evidence in the case, both for and against the accused, is presented. It is the responsibility of the SCM officer to make sure only legal and competent evidence is received and considered at the trial. Only legal and competent evidence received in the presence of the accused at trial can be considered in determining the guilt or innocence of the accused. The Military Rules of Evidence apply to an SCM and must be followed. If a question regarding admissibility of evidence arises, the SCM officer may seek assistance from the local naval legal service office (NLSO) in resolving the issue.

The SCM is authorized to issue subpoenas to compel the appearance at trial of civilian witnesses. In such a case, the SCM officer follows the same procedure detailed for an SPCM or a GCM trial counsel (TC).

TRIAL PROCEEDINGS

The actual trial procedure, while somewhat different from that of the GCM or the SPCM, is governed by the same general principles and has the same basic procedures as those for courts-martial. The major steps of the SCM include the arraignment, motions, pleas, presentation of the evidence, and findings and sentence. Each of these steps will be reviewed individually.

Arraignment

The SCM reads and shows the charges and specifications to the accused and, if necessary, explains them to him or her. The accused may waive the reading of the charges. The SCM officer then asks the accused to plead to each charge and specification.

Motions

Before receiving pleas, the SCM officer allows the accused to make motions to dismiss or for any other relief. The SCM officer takes action on behalf of the accused, if requested by the accused, or if it appears necessary in the interest of justice.

Pleas

When a not guilty plea is entered, the SCM officer proceeds to trial. If the accused pleads guilty to any offense, the SCM officer determines the providence of the plea(s). If the SCM officer is in doubt that the accused's plea(s) of guilty are voluntarily and understandingly made, or if at any time during the trial any matter inconsistent with the plea(s) of guilty arises, the SCM officer enters not guilty plea(s) on behalf of the accused. If the accused refuses to plead, the SCM officer enters not guilty plea(s). The accused may change any plea at any time before findings are announced.

Presentation of Evidence

Witnesses for the prosecution are called first and examined under oath. The accused is permitted to cross-examine these witnesses. The SCM officer can aid the accused in the cross-examination process. The witnesses for the accused are then called and examined under oath.

The SCM officer obtains evidence that tends to disprove the accused's guilt or establishes extenuating circumstances.

Findings and Sentence

The SCM officer announces the findings and sentence to the accused in open session. If the sentence includes confinement, the SCM officer advises the accused of the right to apply to the CA for deferment of the service to confinement. If the accused is found guilty, he or she is informed of the right to submit matters to the CA within 7 days.

POSTTRIAL RESPONSIBILITIES OF THE SUMMARY COURT-MARTIAL OFFICER

After the SCM officer deliberates and announces findings and, where appropriate, the sentence, he or she then must fulfill certain posttrial duties. The nature and extent of these posttrial responsibilities depend upon whether the accused was found guilty or innocent of the offenses charged.

Accused acquitted on all charges—In cases in which the accused has been found not guilty as to all charges and specifications, the SCM officer must do the following:

- Announce the findings to the accused in open session.
- Inform the CA as soon as possible of the findings.
- Prepare the original and at least two copies of the record of trial. A completed SCM record of trial is shown in figure 7-2.
- Serve one copy of the record of trial upon the accused and secure the accused's receipt for it.
- Send the original and one copy of the record of trial to the CA for action.

Accused convicted on some or all of the charges—In cases in which the accused has been found guilty of one or more of the charges and specifications, the SCM officer must do the following:

- Announce the findings and sentence to the accused in open session.
- Advise the accused of the appellate rights under R.C.M. 1306.

- If the sentence includes confinement, inform the accused of his or her right to apply to the CA for deferment of confinement.

- Inform the CA of the results of trial as soon as possible. This includes the findings, sentence, and recommendations for suspension of the sentence and any deferment request.

- Prepare the record of trial.

- Cause one copy of the record of trial to be served upon the accused and secure the accused's receipt.

- Send the original and one copy of the record of trial to the CA for action.

The SCM officer authenticates the record of trial by signing each copy. The CA's action and the review procedures for SCM are discussed in the next chapter.

THE SPECIAL COURTS-MARTIAL

The SPCM is the intermediate level court-martial created by the UCMJ. The maximum penalties that an accused may receive at an SPCM are generally greater than those of an SCM, but less than those of a GCM. The rights of an accused at an SPCM are also generally greater than the rights at an SCM but less than the rights at a GCM. The SPCM is a court consisting of at least three members, trial and defense counsels, and a military judge. The maximum imposable punishment at an SPCM extends to a bad-conduct discharge (BCD), 6 months' confinement, forfeiture of two-thirds pay per month for 6 months, and reduction to paygrade E-1. This chapter will discuss in detail the SPCM and the mechanics of its operation.

CREATION OF THE SPECIAL COURT-MARTIAL

Article 23, UCMJ, and the JAGMAN prescribe who has the power to convene (create) an SPCM. The power to convene an SPCM is nondelegable and, in no event, can a subordinate exercise such authority. Avoid signature titles such as Acting Commanding Officer and Executive Officer on legal documents regardless of the validity of such titles on other administrative correspondence.

The commander of a unit embarked on a naval vessel who is authorized to convene an SPCM should refrain from exercising such authority and defer instead to the desires of the ship's commander.

RECORD OF TRIAL BY SUMMARY COURT-MARTIAL					
1a. NAME OF ACCUSED (<i>Last, First, MI</i>)	b. GRADE OR RANK	c. UNIT OR ORGANIZATION OF ACCUSED	d. SSN		
DOE, John A.	SN, USN	USS HERMITAGE (LSD 34)	444-44-4444		
2a. NAME OF CONVENING AUTHORITY (<i>Last, First, MI</i>)	b. RANK	c. POSITION	d. ORGANIZATION OF CONVENING AUTHORITY		
DOOR, Walter T.	CDR, USN	COMMANDING OFFICER	USS HERMITAGE (LSD 34)		
3a. NAME OF SUMMARY COURT-MARTIAL (<i>If SCM was accuser, so state.</i>)	b. RANK	c. UNIT OR ORGANIZATION OF SUMMARY COURT-MARTIAL			
FROST, Jack R.	LT, USNR	NAVAL LEGAL SERVICE OFFICE, NORFOLK, VA			
(Check appropriate answer)					
				YES	NO
4. At a preliminary proceeding held on <u>1 January</u> 19 <u>CY</u> , the summary court-martial gave the accused a copy of the charge sheet.				X	
5. At that preliminary proceeding the summary court-martial informed the accused of the following:					
a. The fact that the charge(s) had been referred to a summary court-martial for trial and the date of referral.				X	
b. The identity of the convening authority.				X	
c. The name(s) of the accuser(s).				X	
d. The general nature of the charge(s).				X	
e. The accused's right to object to trial by summary court-martial.				X	
f. The accused's right to inspect the allied papers and immediately available personnel records.				X	
g. The names of the witnesses who could be called to testify and any documents or physical evidence which the summary court-martial expected to introduce into evidence.				X	
h. The accused's right to cross-examine witnesses and have the summary court-martial cross-examine on behalf of the accused.				X	
i. The accused's right to call witnesses and produce evidence with the assistance of the summary court-martial if necessary.				X	
j. That during the trial the summary court-martial would not consider any matters, including statements previously made by the accused to the summary court-martial, unless admitted in accordance with the Military Rules of Evidence.				X	
k. The accused's right to testify on the merits or to remain silent, with the assurance that no adverse inference would be drawn by the summary court-martial from such silence.				X	
l. If any findings of guilty were announced, the accused's right to remain silent, to make an unsworn statement, oral or written or both, and to testify and to introduce evidence in extenuation or mitigation.				X	
m. The maximum sentence which could be adjudged if the accused was found guilty of the offense(s) alleged.				X	
n. The accused's right to plead guilty or not guilty.				X	
6. At the trial proceeding held on <u>14 January</u> 19, <u>CY</u> , the accused, after being given a reasonable time to decide, <input type="checkbox"/> did <input checked="" type="checkbox"/> did not object to trial by summary court-martial. (Note: The SCM may ask the accused to initial this entry at the time the election is made.)				JAD	
				(Initial)	
7a. The accused <input type="checkbox"/> was <input checked="" type="checkbox"/> was not represented by counsel. (If the accused was represented by counsel, complete b, c, and d below.)					
b. NAME OF COUNSEL (<i>Last, First, MI</i>)				c. RANK (If any)	
N/A				N/A	
d. COUNSEL QUALIFICATIONS					
N/A					

DD FORM 2329
84 AUG

S/N 0102-LF-002-3290

Figure 7-2A.—Record of Trial by Summary Court-Martial, DD Form 2329 (front).

8. The accused was arraigned on the attached charge(s) and specification(s). The accused's pleas and the findings reached are shown below:		
CHARGE(S) AND SPECIFICATION(S)	PLEA(S)	FINDINGS (Including any exceptions and substitutions)
Charge I: Specification 1: Specification 2:	Guilty Guilty Guilty	Guilty Guilty Guilty
Charge II: Specification 1:	Not Guilty Not Guilty	Guilty Guilty, except for the figure "\$74.00", substituting therefor the figure "\$25.00". Of the excepted figure, not guilty. Of the substituted figure, guilty.
Specification 2:	Not Guilty	Not Guilty

9. The following sentence was adjudged: To be confined for 15 days; to forfeit \$150.00 pay per month for the period of 1 month; and to be reduced to the grade of paygrade E-1.

10. The accused was advised of the right to request that confinement be deferred. (Note: When confinement is adjudged.)
☒ YES ☐ NO

11. The accused was advised of the right to submit written matters to the convening authority, including a request for clemency, and of the right to request review by the Judge Advocate General.
☒ YES ☐ NO

12. AUTHENTICATION

JACK R. FROST, LT, USN
Signature of Summary Court-Martial

14 January 19CY
Date

13. ACTION BY CONVENING AUTHORITY
 Approved and ordered executed. The Navy Brig, Naval Base, Norfolk, Virginia, is designated as the place of confinement.
 The record of trial is forwarded to Commander Amphibious Group TWO, Norfolk, Virginia, for review under Article 64(a), UCMJ.

WALTER T. DOOR
Typed Name of Convening Authority

CDR, USN
Rank

COMMANDING OFFICER
Position of Convening Authority

22 January 19CY
Date

Figure 7-2B.—Record of Trial by Summary Court-Martial, DD Form 2329 (back).

Before any case can be brought before an SPCM, such a court-martial must be convened. The creation of an SPCM is accomplished by the written orders of the CA in which the members are also detailed.

In chapter 6, you learned the procedures for the preparation of the convening order. The order is typed on command letterhead, is dated and serialized, and is signed personally by the CA. The order specifies the names and ranks of all members detailed to serve on the court. When a proper convening order is executed, an SPCM is created and remains in existence until dissolved. A sample convening order can be found in chapter 6.

COMPOSITION OF SPECIAL COURTS-MARTIAL

There are several configurations of an SPCM depending upon either the desires of the CA or the desires of the accused. The constitution of the court refers to the court's composition; that is, the personnel involved. The different types of SPCM compositions are as follows:

Three members—One type of SPCM consists of a minimum of three members and counsel, but no military judge. Such an SPCM can try any case referred to it but cannot adjudge a sentence (in enlisted cases) of more than 6 months' confinement, forfeiture of two-thirds pay per month for 6 months, and reduction to paygrade E-1. So, in ordinary circumstances, a punitive discharge may not be adjudged. Where a three-member type of court-martial is used, the CA must include in the Referral block on the charge sheet instruction that a BCD is not an authorized punishment.

Military judge and members—This type of SPCM involves counsel, at least three members, and a military judge. The members' role is similar to that of a civilian jury. They determine guilt or innocence and impose sentence. The senior member is, in effect, the jury foreman who presides during deliberations. The military judge functions as does a civilian criminal court judge. He or she resolves all legal questions that arise and otherwise directs the trial proceedings. This form of SPCM is authorized to adjudge a punitive discharge and has become fairly standard in the naval service.

Military judge alone—This form of SPCM is not created by a convening order, but by the accused's exercise of a statutory right. The accused has the right to request orally on the record or in writing a trial by

military judge alone—without members. Before choosing to be tried by a military judge alone, an accused is entitled to know the identity of the judge who will sit on his or her case. The TC may argue against the request when it is presented to the military judge. The judge rules on the request and, if the request is granted, he or she discharges the court members for the duration of that case only. A court-martial so configured is authorized to impose a sentence extending to a punitive discharge.

IMPROPER CONSTITUTION OF THE COURT

Requisites to the power of a court-martial to try a case are jurisdiction over the offense, jurisdiction over the defendant, proper convening, and proper constitution. A deficiency in any of these requisites makes the court powerless to adjudicate a case lawfully. The rules relating to constitution of the court must, therefore, be carefully observed.

QUALIFICATIONS OF MEMBERS

Selection of members—The CA has the ultimate legal responsibility to select the court members. This responsibility cannot be delegated. The CA may choose from lists of members suggested by subordinates, but the final decision is his or hers. A CA appoints, as members, those personnel who, in his or her judgment, are best qualified by reason of age, education, training, experience, length of service, and judicial temperament. These factors, of course, vary with individuals and do not necessarily depend on the grade of the particular person. No person in arrest or confinement is eligible to be a court member. Similarly, no person who is an accuser, witness for the prosecution, or has acted as investigative officer or counsel in a given case is eligible to serve as a member for that case.

Commissioned officers—The members of an SPCM must, as a general rule, be commissioned officers. When the accused is an enlisted service member, noncommissioned warrant officers are eligible to be court members. No member of the court should be junior in grade to the accused if it can be avoided. Members of an armed force other than that of the accused may be used, but at least a majority of the members should be of the same armed force as the accused.

Enlisted members—An enlisted accused has a right to be tried by a court consisting of at least one-third enlisted members. The accused desiring enlisted membership submits a personally signed request before the conclusion of any Article 39(a), UCMJ, session (pretrial hearing), or before the assembly of the court at trial, or makes the request orally on the record. Only enlisted persons who are not of the same unit as the accused can lawfully be assigned to the court. Unit means company, squadron, battery, ship, or similar sized element,

If, when requested, enlisted members cannot be detailed to the court, the CA may direct the original court to proceed with the trial. Such actions should only be taken when enlisted service members cannot be assigned because of extraordinary circumstances. In such a case, the CA sends to the TC for attachment to the record of trial, a detailed explanation of the extraordinary circumstances and why the trial must proceed without enlisted members.

QUALIFICATIONS OF THE MILITARY JUDGE

The military judge of an SPCM must be a commissioned officer, a member of the bar of the highest court of any state or the bar of a federal court, and certified by the Judge Advocate General as qualified to be a military judge. A military judge qualified to act on GCM cases can also act on SPCM cases.

QUALIFICATIONS OF COUNSEL

Articles 19 and 38, UCMJ, describe the accused's right to counsel at SPCMs. Article 27, UCMJ, sets forth the qualifications for counsel.

Trial Counsel

The TC in military criminal law serves as the prosecutor. For an SPCM, the TC need only be a commissioned officer.

Defense Counsel

There are various types of defense counsel (DC) in military practice. The detailed DC is the DC initially assigned to the case. Individual counsel is a counsel requested by the accused and can be a civilian or military lawyer.

DETAILED DEFENSE COUNSEL.— Article 27(c), UCMJ, describes the qualifications for detailed

DCs at SPCMs. An Article 27(b) DC is detailed at no cost to the accused unless, due to military exigencies or physical conditions, one cannot be obtained.

The protection given to an accused by Article 27(c) is expanded in that it requires Article 27(b) counsel to be detailed as detailed DCs in SPCMs.

INDIVIDUAL COUNSEL.— The term *individual counsel* is used to refer to a counsel specifically requested by an accused. Such counsel may be military or civilian.

CIVILIAN COUNSEL.— At any SPCM, the accused has the right to be represented by civilian counsel provided by him or her at his or her own expense. When the accused retains such counsel, the detailed DC remains to assist the individual counsel unless expressly excused by the accused. The accused is entitled to a reasonable delay before trial for the purpose of obtaining and consulting with civilian individual counsel.

INDIVIDUAL MILITARY COUNSEL.— At an SPCM, the accused has the right to be represented by a military counsel of his or her own choice at no cost to the accused if such counsel is reasonably available.

No Defense Counsel

An accused has the right to represent himself or herself at an SPCM without assistance of counsel.

REFERRAL OF CHARGES

The process of referring a given case to trial by SPCM is essentially the same as that for referral to an SCM. Thus, the principles that apply to the preliminary inquiry, preferral of charges, informing the accused, and receipt of sworn charges also apply to the SPCM. As far as the referral process is concerned, the only essential difference between the referral of an SCM and an SPCM is the information contained in block 14 on page 2 of the charge sheet.

Referral to Trial

If, after reviewing the applicable evidence, the CA determines that trial by SPCM is warranted, he or she executes Part V of the charge sheet in the proper manner. In addition to the command data entered on the appropriate lines of block 14, the CA indicates the type of court-martial to which the case is being referred, the particular SPCM to which the case is

assigned, and any special instructions. Block 14 is then personally signed by the CA or by his or her personal order reflecting the signer's authority. It might serve well to recall that a clear and concise serial system is essential to proper referral. The referral should identify a particular court to hear the case; that is, it should relate to a specific convening order. Take care in preparing convening orders and referral blocks to avoid confusion and legal complications at the trial.

Withdrawal of Charges

Withdrawal of charges is a process by which the CA takes from a court-martial a case previously referred to it for trial. The CA cannot withdraw charges from one court and re-refer them to another without proper reasons. These reasons are articulated in writing by the CA and included in the record of trial when the case is tried by the second court. The CA may withdraw charges for the purpose of dismissing them for any reason deemed sufficient to him or her. Mechanically, accomplish the withdrawal by drawing a diagonal line across the referral block on page 2 of the charge sheet and have the CA initial the line-out. It is also advisable to write withdrawn across the endorsement and date the action.

DISESTABLISHMENT OF THE COURT.—

Perhaps the most frequently occurring withdrawal problem is presented when the CA wants to disestablish the court and create another to take its place. This usually happens when several members have been transferred, or the particular court has been in existence for a long time, and the CA wants to relieve the court. Such grounds are valid and constitute a proper reason. If evidence shows that a change was made because the CA was displeased with the leniency of a sentence or the number of acquittals, then the withdrawal would not be lawful. Whenever a new court relieves an old one, it creates a problem with respect to the cases previously referred to the old court (which was, disestablished and are now being referred to the new court. Remember, only the court to which a case is specifically referred can try it. The CA can withdraw each case from the old court (by lining out the referral block) and then re-refer the case to the new court. This action is accomplished by executing a new block 14 referral on the charge sheet, indicating the serial number and date of the convening order that appoints the new court. The new referral is taped along the top edge over the old lined-out referral to allow inspection of both referrals.

CHANGE IN COURT—NO DISESTABLISHMENT.— Sometimes a CA may have good cause for withdrawing a case from a court that he or she does not intend to disestablish. For instance, one of several court panels may be backlogged and the CA may wish to redistribute the pending cases. This action is accomplished by lining out and initialing the old referral block on the charge sheet and executing a new block 14 re-referring the case to a new court. The new block 14 is taped over the old one to allow inspection of both referrals.

Amendment of Charges

In some instances, an amendment to a specification will necessitate further administrative action with respect to the charge sheet. Minor changes in the form of correction of typographical errors normally will require no more administrative action than lining out and initialing the erroneous data and substituting the correct data. If, on the other hand, the contemplated change involves any new person, offense, or matter not fairly included in the charges as originally preferred, the amended specification must go through the preferral-referral process or the accused can exercise his or her right to object to trial on the unsworn charges.

Additional Charges

If an accused awaiting trial on certain charges commits new offenses, or other previously unknown offenses are discovered, an entirely new charge sheet is prepared. The CA states, in the special instructions section of the referral block, that the additional charges are to be tried together with the charges originally referred to the court-martial.

TRIAL PROCEDURE

It is not necessary that you have a complete understanding of all the complex rules and procedures applicable to the SPCM. However, it is essential that you have a general knowledge of the mechanics of the trial process. Though an infinite number of variations exist in any particular case, the following procedure is generally followed in most SPCMs.

Service of Charges

In time of peace no person can be brought to trial in any SPCM until 3 days have elapsed since the formal service of charges upon that person. In computing

the 3-day period, neither the date of service nor the date of trial count. Sundays and holidays do count, however, in computing the statutory period. If the accused is served on Wednesday, one must wait Thursday, Friday, and Saturday before compelling trial. Trial in this example could not be compelled before Sunday, and, as a practical matter, not before Monday. You will find that at U.S. shore establishments, trials normally do not occur on the weekends. However, when ships are at sea or in overseas ports, a trial is possible at any time and any day of the week.

The date of service of charges upon the accused is reflected by the certificate in block 15 at the bottom of page 2 of the charge sheet. The TC normally executes this certificate when he or she presents a copy of the charge sheet to the accused personally. He or she must do this even though the accused has previously been informed of the charges against him or her. This service of a copy of the charge sheet may also be done by the command at any time after referral as long as the service is to the accused personally. Any accused can lawfully object to participating in trial proceedings before the 3-day waiting period has expired. The accused may, however, waive the 3-day period, so long as he or she understands the right and voluntarily agrees to go to trial earlier.

Pretrial Hearings

After the 3-day period has elapsed, the military judge may hold sessions of court without members for the purpose of litigating motions, objections, and other matters not amounting to a trial of the accused's guilt or innocence. The accused may be arraigned and his or her pleas taken and determined at such a hearing. At such hearings, the judge, TC, DC, accused, and reporter will be present. Several such hearings may be held if desired. These hearings are commonly referred to as Article 39(a) sessions.

Preliminary Matters

At the initial pretrial hearing (Article 39(a) session), the first order of business is to incorporate into the record those documents relating to the convening of the court and referral of the case for trial. Also all oaths are administered. The convening order and the charge sheet and any amendments to either document become matters of record at this point in the proceedings.

In addition, an accounting of the presence or absence of those personnel required to be present is made. This accounting includes all persons named in the convening order, the counsel, the reporter, and the military judge. Qualifications of all personnel are checked for the record.

The Arraignment

The arraignment is the procedure involving the reading of the charges to the accused and asking for the accused's pleas. The actual pleading is not part of the arraignment. The arraignment is complete when the accused is asked to enter his or her pleas. This stage is an important one in the trial because if the accused voluntarily absents himself or herself without authority and does not thereafter appear during court sessions, he or she may nevertheless be tried and, if the evidence warrants, convicted. The arraignment is also the cutoff point for the adding of additional charges to the trial. After arraignment, no new charges can be added without the consent of the accused.

Motions

At arraignment, the military judge advises the accused that his or her pleas are about to be requested and that if he or she desires to make any motions he or she should now do so. Many times all such motions (attacking jurisdiction, sufficiency of charges, illegal pretrial confinement, and speedy trial) will have already been litigated at a previous pretrial hearing. Nevertheless, the accused may decide to make additional motions and is allowed to do so. If there are motions, they are litigated at this time. If there are no motions, the trial proceeds to the arraignment.

Pleas

The arraignment is the process of asking the accused to plead to charges and specifications. The responses of the accused to each specification and charge are known as the pleas. The recognized pleas in military practice are guilty, not guilty, guilty to a lesser included offense, and, under some circumstances, a conditional plea of guilty. Any other pleas (such as *nolo contendere*) are improper, and the military judge enters a plea of not guilty for the accused.

NOT GUILTY PLEAS.— When not guilty pleas are entered by the court or accused, the trial proceeds to the presentation of evidence—first by the prosecutor and then by the defense.

GUILTY PLEAS.— Where guilty pleas are entered or the accused pleads guilty to a lesser included offense, the judge determines that such pleas are made knowingly and voluntarily and that the accused understands the meaning and effect of such pleas. This process is known as providency. The military judge advises the accused (1) of the maximum sentence that can be imposed in his or her case; (2) that a plea of guilty is the strongest form of proof known to the law; and (3) that by pleading guilty the accused is giving up the right to a trial of the facts, the right against self-incrimination, and the right to confront and to cross-examine the witness against him or her. In addition, the judge explores the facts thoroughly with the accused to obtain from the accused an admission of guilt-in-fact to each element of the offense(s) to which the pleas relate.

CONDITIONAL PLEAS.— With the approval of the military judge and the consent of the TC, an accused may enter a conditional plea of guilty. The main purpose of such a conditional plea is to preserve for appellate review certain adverse determinations that the military judge may make against the accused regarding pretrial motions. If the accused prevails on appeal, his or her conditional plea of guilty may then be withdrawn.

Assembly of the Court

After the accused enters pleas, the military judge assembles the court. This is done by bringing the members into the courtroom if it is a member's trial. The military judge announces that all parties are present and the members are sworn. The court is then assembled. After assembly the military judge may give preliminary instructions to the members. Any witnesses that are expected to be called to testify are asked to withdraw from the courtroom. The TC restates the general nature of the charges in the case for the benefit of the members.

Challenge Procedure

Where the court is composed of members, the next stage will involve a determination of the eligibility of court members to participate in the trial. Members may be asked questions individually or collectively. This procedure is called *voir dire*. This procedure determines whether or not a member is suitable to sit as a member of the court-martial.

Mechanically, both the TC and DC are given an opportunity to question each member to see if a

ground for challenge exists. In this connection, there are two types of challenges—challenges for cause and peremptory challenges. A challenge, if sustained by the judge who rules upon it, excuses the challenged member from further participation in the trial. The law places no limit on the number of challenges for cause that can be made at a trial. A peremptory challenge is a challenge that can be made for any reason. The TC and accused are entitled to one peremptory challenge.

Case on the Merits

At this point the military judge announces to the members the plea(s) of the accused. The TC and DC may make one opening statement to the court before the presentation of evidence begins. The defense may elect to make its opening statement after the prosecution has rested and before the presentation of evidence for the defense. After opening statements are made, the prosecution commences presenting his or her case-in-chief. Each party has full opportunity to present evidence. Ordinarily the following sequence is used:

- Presentation of evidence for the prosecution
- Presentation of evidence for the defense
- Presentation of prosecution evidence in rebuttal
- Presentation of defense evidence in surrebuttal
- Additional rebuttal evidence in the discretion of the military judge
- Presentation of evidence requested by the military judge or members

The testimony of witnesses is taken orally in open session. Each witness must testify under oath. After the witness is sworn he or she is identified for the record. The party calling the witness conducts direct examination of the witness, followed by cross-examination of the witness by the opposing party. Redirect and recross-examinations are conducted as necessary followed by any questions by the military judge or members. All documentary and real evidence is marked and introduced into evidence.

Argument on Findings and Findings

After all evidence has been presented, the TC makes argument on findings. Following the TC's argument, the DC presents argument. In this stage the

TC is allowed to make another argument, rebutting anything that was brought up by the DC. After all arguments are complete and if the trial is composed of members, the military judge instructs the members on findings. The members withdraw from the courtroom for deliberation on findings.

If the court is composed of members, the president of the court will announce the findings. If no members, the judge announces findings. At an SPCM, two-thirds of the members present at trial must agree on each finding of guilty. In computing the necessary number of votes to convict, a resulting fraction is counted as one. Thus, on a court of five members, the number of voters required to convict is three and one-third or, applying the rule, four votes. In a trial by military judge alone, the required number of votes is one—the judge's.

Presentencing Procedure

After findings of guilty have been announced, the prosecution and defense may present matters to aid the court-martial in determining an appropriate sentence. Such matters are ordinarily presented by the TC in the following sequence:

- Service record data relating to the accused taken from the charge sheet
- Personal data relating to the accused and of the character of the accused's prior service as taken from the service record
- Evidence of prior convictions, military or civilian
- Evidence of rehabilitative potential

Extenuation and Mitigation

The defense may present matters in rebuttal of any material presented by the prosecution and may present matters in extenuation and mitigation. Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense that do not constitute a legal justification or excuse. Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency.

The accused may testify, make an unsworn statement, or both in extenuation, in mitigation or to rebut matters presented by the prosecution, or for all three

purposes. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty.

Argument on Sentence and Sentence

After introduction of matters relating to sentencing, counsel for the prosecution and defense may argue for an appropriate sentence. Again, if it is a members' trial, the military judge will instruct the members on sentencing. As with findings, two-thirds of the members must be in concurrence for a particular sentence. In a members' trial, the president of the court will announce sentence, otherwise the military judge announces it. Immediately after sentencing the military judge informs the accused of posttrial and appellate rights.

Adjournment

The military judge adjourns the court-martial at the end of the trial of an accused or proceeds to trial of other cases referred to that court-martial.

Clemency

After trial, any or all court members and/or the military judge may recommend that the CA exercise clemency to reduce the sentence, notwithstanding their vote on the sentence at trial.

SPECIAL COURT-MARTIAL PUNISHMENTS

Articles 19, 55, and 56, UCMJ, and R.C.M. 1003 are the primary references concerning the punishment authority of the SPCM. Appendix 12 and part IV, MCM, 1984, also address punishment power. Part IV of the MCM contains the maximum permissible punishment for a particular offense. The other references further limit punitive authority, depending on the level of court-martial and type of punishment being considered.

Prohibited Punishments

Article 55, UCMJ, flatly prohibits flogging, branding, marking, tattooing, the use of irons (except for safekeeping of prisoners), and any other cruel and unusual punishment. Other punishments not recognized by service customs include shaving the head, tying up by hands, carrying a loaded knapsack, placing in stocks, loss of good conduct time (a strictly

administrative measure), and administrative discharge.

Jurisdictional Maximum Punishments

In no case can an SPCM lawfully adjudge a sentence in excess of a BCD, confinement for 6 months, forfeiture of two-thirds pay per month for 6 months, and reduction to paygrade E-1. Within those outer limits are a number of variations of lesser forms of punishment that may be adjudged.

Authorized Punishments

Appendix 12 and part IV, MCM, 1984, list the specific maximum punishments for each offense as determined by statutory provisions or by the President of the United States pursuant to authority delegated by Article 56, UCMJ. An accused, as a general rule, may be separately punished for each offense of which he or she is convicted, unlike NJP where only one punishment is imposed for all offenses. Thus, an accused convicted of unauthorized absence (Article 86), assault (Article 128), and larceny (Article 121) is subject to a maximum sentence determined by totaling the maximum punishment for each offense. A chart that lists punishments authorized at each type of court-martial is illustrated in figure 7-3. We will address each individual type of punishment.

PUNITIVE SEPARATION FROM THE SERVICE.— An SPCM is empowered to sentence an enlisted accused to separation from the service with a BCD. This is true provided the discharge is authorized for one or more of the offenses for which the accused stands convicted or by virtue of an escalator clause (discussed later). An SPCM is not authorized to sentence any officer or warrant officer to separation from the service. A BCD is a separation from the service under conditions not honorable and is designed as a punishment for bad conduct rather than as a punishment for serious military or civilian offenses. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears necessary.

The practical effect of this type of separation is less severe than a dishonorable discharge (DD), where the accused automatically becomes ineligible for almost all veterans' benefits. The effect of a BCD on veterans' benefits depends upon whether it was adjudged by a GCM or an SPCM, whether the benefits are administered by the service concerned or by the

Department of Veterans Affairs, and upon the particular facts of a given case.

CONFINEMENT.— Confinement involves the physical restraint of an adjudged service member in a brig or prison. Under military law, confinement automatically includes hard labor, but the law prefers that the sentence be stated as confinement—omitting the words *at hard labor*. Omission of the words *hard labor* does not relieve the accused of the burden of performing hard labor. An SPCM can adjudge 6 months' confinement upon an enlisted service member, but may not impose any confinement upon an officer or warrant officer. Part IV, MCM, limits this punishment to an even lesser period for certain offenses. As an example, failure to go to appointed place of duty (Article 86) has a maximum confinement punishment of only 1 month.

HARD LABOR WITHOUT CONFINEMENT.— This form of punishment is performed in addition to routine duties and may not lawfully be used instead of regular duties. The number of hours per day and the character of the hard labor will be designated by the immediate CO of the accused. The maximum amount of hard labor that can be adjudged at an SPCM is 3 months. This punishment is impossible only on enlisted persons and not upon officers or warrant officers. After each day's hard labor assignment has been performed, the accused should then be permitted normal liberty or leave. Hard labor means rigorous work but not so rigorous as to be injurious to the health of the accused. Hard labor cannot be required to be performed on Sundays, but may be performed on holidays. Hard labor can be combined with any other punishment.

RESTRICTION.— Restriction is a moral restraint upon the accused to remain within certain specified limits for a specified time. Restriction may be imposed on all persons subject to the UCMJ, but not in excess of 2 months. Restriction is a less severe form of deprivation of liberty than confinement or hard labor without confinement and may be combined with any other punishment. The performance of military duties can be required while an accused is on restriction.

CONFINEMENT ON BREAD AND WATER/DIMINISHED RATIONS.— As its name suggests, this punishment involves confinement coupled with a diet of bread and water or diminished rations. A diet of bread and water allows the accused as much bread and water as he or she can eat or drink. Diminished rations is food from the regular daily

PUNISHMENT	SCM		SPCM		GCM		
	E-4 & BELOW	E-5 & ABOVE	EMs	Os & WOs	EMs	WOs	Os
1. Death	NO	NO	NO	NO	YES (*1)	YES (*1)	YES (*1)
2. Dismissal	NO	NO	NO	NO	NO	NO	YES
3. Dishonorable Discharge	NO	NO	NO	NO	YES	YES	NO
4. Bad-conduct discharge	NO	NO	YES	NO	YES	NO	NO
5. Confinement	30 days	NO	6 mo	NO	YES (*5)	YES (*5)	YES (*5)
6. Solitary Confinement	NO	NO	NO	NO	NO	NO	NO
7. Confinement on bread and water or diminished rations	3 days (*2)	NO	3 days (*2)	NO	3 days (*2)	NO	NO
8. Restriction	2 mo	2 mo	2 mo	2 mo	2 mo	2 mo	2 mo
9. Hard labor w/o confinement	45 days	NO	3 mo	NO	3 mo	NO	NO
10. Forfeiture of all pay and allowances	NO	NO	NO	NO	YES	YES	YES
11. Forfeiture of 2/3 pay per month	1 mo (*3)	1 mo. (*3)	6 mo	6 mo	YES (*5)	YES	YES
12. Fine	YES (*4)	YES (*4)	YES (*4)	YES (*4)	YES	YES	YES
13. Reduction to next inferior paygrade	YES	YES	YES	NO	YES	NO	NO
14. Reduction to lowest paygrade	YES	NO	YES	NO	YES	NO	NO
15. Loss of numbers	NO	NO	NO	YES	NO	YES	YES
16. Reprimand	YES	YES	YES	YES	YES	YES	YES

(*1) Where authorized or mandatory

(*2) If attached to or embarked in a naval vessel

(*3) May extend payment up to 3 months (JAGMAN 0019b)

(*4) If given, a fine or a fine and forfeiture combination may not exceed the maximum amount of forfeitures which may be adjudged in a case

(*5) Maximum punishment listed for each offense in part IV, MCM

Figure 7-3.—Punishment chart.

rations constituting a nutritionally balanced diet, but limited to 2,100 calories per day. No hard labor may be required to be performed by an accused undergoing this type of punishment. Confinement on bread and water/diminished rations may be imposed only upon

enlisted persons in paygrades E-1 to E-3 who are attached to or embarked in a vessel and then only for a maximum of 3 days. Further, both the prisoner and the confinement facility must be inspected by a medical officer who must certify in writing that the

punishment will not be injurious to the accused's health and that the facility is medically adequate for human habitation.

FORFEITURE OF PAY.— This kind of punishment involves the deprivation of a specified amount of the accused's pay for a specific number of months. The maximum amount that is subject to forfeiture at an SPCM is two-thirds of 1 month's pay per month for 6 months. The forfeiture must be stated in terms of pay per month for a certain number of months. The basis for computing the forfeiture is the base pay of the accused plus any sea and foreign duty pay. Other pay and allowances are not used as part of the basis. If the sentence is to include reduction in grade, the forfeiture must be based upon the grade to which the accused is to be reduced. A forfeiture may be imposed by an SPCM upon all military personnel. The forfeiture applies to pay becoming due after the forfeitures have been imposed and not to monies already paid to the accused. Unless suspended, forfeitures take effect on the date ordered executed by the CA when initial action is taken.

FINE.— A fine is a lump-sum judgment against the accused requiring him or her to pay specified money to the United States. A fine is not taken from the accused's accruing pay, as with forfeitures, but rather becomes due in one payment when the sentence is ordered executed. To enforce collection, a fine may also include a provision that, in the event the fine is not paid, the accused will, in addition to the confinement adjudged, be confined for a specified time. The total period of confinement so adjudged may not exceed the jurisdictional limit of the specified court-martial should the accused fail to pay the fine. While an SPCM can impose a fine upon all personnel, the punishment should not be adjudged unless the accused has been unjustly enriched by his or her crimes. A fine cannot exceed the total amount of money that the court could have required to be forfeited. The court may, however, award both a fine and forfeitures, so long as the total monetary punishment does not exceed the amount that could have been required to be forfeited.

REDUCTION IN GRADE.— This form of punishment has the effect of taking away the paygrade of an accused and placing him or her in a lower paygrade. Accordingly, this punishment can only be used against enlisted persons in other than the lowest paygrade. Officers may not be reduced in grade. An SPCM may reduce an enlisted service member to the lowest paygrade regardless of grade before

sentencing. A reduction can be combined with all other forms of punishment.

According to the power granted in Article 58(a), UCMJ, SECNAV has determined that automatic reduction will be effected according to the JAGMAN. Under the provisions of this section, a court-martial sentence of an enlisted member in a paygrade above E-1, as approved by the CA, that includes a punitive discharge or confinement in excess of 90 days (if the sentence is awarded in days) or 3 months (if awarded in months) automatically reduces the member to the paygrade of E-1 as of the date the sentence is approved. As a matter within his or her sole discretion, the CA or the supervisory authority may retain the accused in the paygrade held at the time of sentence or at an intermediate paygrade and suspend the automatic reduction to paygrade E-1 that would otherwise be in effect. Additionally, the CA may direct that the accused serve in paygrade E-1 while in confinement, but be returned to the paygrade held at the time of sentencing or an intermediate paygrade upon release from confinement. Failure of the CA to address automatic reduction will result in the automatic reduction to paygrade E-1 taking effect on the date of the CA's action.

LOSS OF NUMBERS.— Loss of numbers is the dropping of an officer a stated number of places on the lineal precedence list. Lineal precedence is lost for all purposes except consideration for promotion. This exception prevents the accused from avoiding or delaying being passed over. Loss of numbers does not reduce an officer in grade nor does it affect pay or allowances. Loss of numbers may be adjudged in the case of commissioned officers, warrant officers, and commissioned warrant officers. This punishment may be combined with all other punishments.

PUNITIVE REPRIMAND.— An SPCM may also adjudge a punitive reprimand against anyone subject to the UCMJ. A reprimand is nothing more than a written statement criticizing the conduct of the accused. In adjudging a reprimand, the court does not specify the wording of the statement but only its nature. The JAGMAN contains guidance for drafting the reprimand.

Circumstances Permitting Increased Punishments

There are three situations in which the maximum limits of part IV, MCM, may be exceeded. These are known as the escalator clauses and are designed to

permit a punitive discharge in cases involving chronic offenders. In no event, however, may the so-called escalator clauses operate to exceed the jurisdictional limits of a particular type of court-martial. With respect to an SPCM, these three clauses have the following impact.

Three or more convictions—If an accused is convicted of an offense for which part IV, MCM, does not authorize a DD, proof of three or more previous convictions by court-martial during the year preceding the commission of any offense of which the accused is convicted will allow an SPCM to adjudge a BCD, forfeiture of two-thirds pay per month for 6 months, and confinement for 6 months, even though that much punishment is not otherwise authorized. In computing the 1-year period, any unauthorized absence time is excluded.

Two or more convictions—If an accused is convicted of an offense for which part IV, MCM, does not authorize a punitive discharge, proof of two or more convictions within 3 years preceding the commission of any of the current offenses will authorize an SPCM to adjudge a BCD, forfeiture of two-thirds pay per month for 6 months, and, if the confinement authorized by the offense is less than 3 months, confinement for 3 months. For purposes of the second escalator clause, periods of unauthorized absence are excluded in computing the 3-year period.

Two or more offenses—If an accused is convicted of two or more separate offenses, none of which authorize a punitive discharge, and if the authorized confinement for these offenses totals 6 months or more, an SPCM may adjudge a BCD and forfeiture of two-thirds pay per month for 6 months.

PRETRIAL ASPECTS OF GENERAL COURTS-MARTIAL

The GCM is the highest level of court-martial in the military justice system. Such a court-martial may impose the greatest penalties provided by military law for any offense. The GCM is composed of a minimum of five members, a military judge, and lawyer counsel for the government and the accused. In some cases, the court is composed of a military judge and counsel. The GCM is created by the order of a flag or general officer in command in much the same manner as the SPCM is created by subordinate commanders. Before a trial by GCM may lawfully occur, a formal investigation of the alleged offenses must be conducted and

a report forwarded to the OEGCMJ. This pretrial investigation (often referred to as an Article 32 investigation) is normally convened by an SCM CA. This section will discuss the legal requisites of the pretrial investigation.

NATURE OF THE PRETRIAL INVESTIGATION

The formal pretrial investigation (Article 32, UCMJ) is the military equivalent of the grand jury proceeding in the civilian criminal procedure. The purpose of this investigation is to inquire formally into the truth of allegations contained in a charge sheet, to secure information pertinent to the decision on how to dispose of the case, and to aid the accused in discovering the evidence against which he or she must defend himself or herself. Basically, this investigation is protection for the accused; but it is also a sword for the prosecutor who may test his or her case for its strength in such a proceeding and seeks its dismissal if too frail or if groundless.

Authority to Direct

An Article 32, UCMJ, investigation may be directed by one authorized by law to convene an SCM or some higher level of court-martial. As is true of all other forms of convening authority, the power to order the Article 32, UCMJ, investigation vests in the office of the commander.

Mechanics of Convening

When the SCM or higher CA receives charges against an accused that are serious enough to warrant trial by a GCM, the CA directs a pretrial investigation. This is done by written orders of the CA, which assign personnel to participate in the proceedings. At the time the investigation is ordered, the charge sheet will have been completed up to, but not including, the referral block on page 2. Unlike courts-martial, pretrial investigations are directed as required, and standing orders for such proceedings are inappropriate. Also unlike courts-martial, there is no separate referral of a case to a pretrial investigation since the order creating the investigation also amounts to a referral of the case to the pretrial investigation. The original appointing order is sent to the assigned investigating officer along with the charge sheet, allied papers, and blank Investigating Officer's Report, DD Form 457.

Investigating Officer

The pretrial investigation is a formal one-officer investigation into alleged criminal misconduct. The investigating officer must be a commissioned officer who should be a major/lieutenant commander or above, or an officer with legal training. The advantages of appointing a judge advocate (when available) to act as the investigating officer are substantial, especially in view of the increasingly complex nature of the military judicial process. Neither an accuser, prospective military judge, nor prospective TC or DC for the same case may act as the investigating officer. Further, the investigating officer must be impartial and cannot previously have had a role in inquiring into the offenses involved; for example, the provost marshal or public affairs officer. Mere prior knowledge of the facts of the case will not, alone, disqualify a prospective investigating officer. If such knowledge imparts a bias to the investigating officer, then he or she obviously is not the impartial investigator required by law. The law contemplates an investigating officer who is fair, impartial, mature, and with a judicial temperament. It is the responsibility of the CA to see that such an officer is appointed to pretrial investigations. If it is necessary for a nonlawyer investigating officer to obtain advice regarding the investigation, that advice should not be sought from one who is likely to prosecute the case.

Counsel for the Government

While the pretrial investigation need not be an adversarial proceeding, current practice favors having the CA detail a lawyer to represent the interests of the government, especially when the investigating officer is not a lawyer. The assignment of a counsel for the government does not lessen the obligation of the investigating officer to investigate the alleged offenses thoroughly and impartially. As a practical matter, however, the presence of lawyers representing the government and the accused make the pretrial investigation an adversarial proceeding. Counsel for the government functions much as a prosecutor does at trial and presents evidence supporting the allegations contained on the charge sheet.

Defense Counsel

The accused's rights to counsel are as extensive at the pretrial investigation as at the GCM. More specifically, an accused is entitled to be represented by civilian counsel, if provided by the accused at no expense

to the government, and by a detailed military lawyer, certified according to Article 27(b), UCMJ, or by a military lawyer of his or her own choice at no cost to the accused if such counsel is reasonably available. The detailed DC at a pretrial investigation must be a certified lawyer and be designated by the appointing order. Individual counsel, military or civilian, is normally not detailed on the appointing order. An accused is not entitled to more than one military counsel in the same case.

Reporter

There is no requirement that a record of the pretrial investigation proceedings be made, other than the completion of the investigation officer's report. Accordingly, a reporter need not be detailed. It is a common practice, however, to assign a reporter to prepare a verbatim record—particularly in complex cases. When such a record is desired, the CA may detail a reporter but such assignment is usually made orally and is not part of the appointing order.

APPOINTING ORDER

The order directing a pretrial investigation may be drafted in any acceptable form so long as an investigation is ordered and an investigating officer and counsel are detailed. A suggested format is shown in figure 7-4.

PREHEARING PREPARATION

When the pretrial investigation officer receives his or her order of appointment, he or she should first study the charge sheet and allied papers to become thoroughly familiar with the case. The charge sheet should be reviewed for errors and any needed corrections should be noted. The pretrial investigation officer should consult the accused, counsel, and the legal officer of the CA to set up a specific hearing date.

WITNESSES

All reasonably available witnesses who appear necessary for a thorough and impartial investigation are required to be called before the Article 32 investigation. Transportation and per diem expenses are provided for both military and civilian witnesses. Witnesses are reasonably available and, therefore, subject to production, when the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on

DEPARTMENT OF THE NAVY
U.S. Naval Support Activity
FPO AE 09619-1000

17 Jul 19CY

In accordance with R.C.M. 405, MCM, 1984, Commander Jon T. Boate, JAGC, U.S. Navy, is hereby appointed to investigate the attached charges preferred against Seaman Very C. Pistol, U.S. Navy. The charge sheet and allied papers are appended hereto. The investigating officer will be guided by the provisions of R.C.M. 405, MCM, 1984, and current case law relating to the conduct of pretrial investigations. In addition to the investigating officer hereby appointed, the following personnel are detailed to the investigation for the purposes indicated:

COUNSEL FOR THE GOVERNMENT

Lieutenant Jane B. Doe, JAGC, U.S. Naval Reserve, certified in accordance with Article 27(b), Uniform Code of Military Justice.

DEFENSE COUNSEL

Lieutenant Mary N. Christmas, JAGC, U.S. Naval Reserve, certified in accordance with Article 27(b), Uniform Code of Military Justice.

WATER T. DOOR
Captain, U.S. Navy
Commanding Officer
U.S. Naval Support Activity
Naples, Italy

Figure 7-4. Sample appointing order for an Article 32 pretrial investigation.

military operations of obtaining the witness' appearance. This balancing test means that the more important the expected testimony of the witness, the greater the difficulty, expense, delay, or effect on military operations must be to permit nonproduction. Similar considerations apply to the production of documentary and real evidence.

For both military and civilian witnesses, the pretrial investigation officer makes the initial determination on availability. For military witnesses, the immediate CO of the witness may overrule the pretrial investigation officer's determination. The decision not to make a witness available is subject to review by the military judge at trial.

A civilian witness whose testimony is material must be invited to testify, although he or she cannot be subpoenaed or otherwise compelled to appear at the investigation. Thus, the pretrial investigation officer should make a bona fide effort to have such civilian witnesses appear voluntarily, offering transportation expenses and a per diem allowance if necessary.

STATEMENTS

The pretrial investigation officer has a number of alternatives to live testimony. When a witness is not reasonably available, even if the defense objects, the pretrial investigation officer may consider that witness' sworn statement. Unless the defense objects, a pretrial investigation officer may also consider, regardless of the availability of the witness, sworn and unsworn statements, prior testimony, and offers of proof of expected testimony of that witness.

Upon objection, only sworn statements may be considered. Since objections to unsworn statements are generally made, every effort should be made to get sworn statements. All statements considered by the pretrial investigation officer should be shown to the accused and the counsel. The same procedure should be followed with respect to documentary and real evidence.

TESTIMONY

All testimony given at the pretrial investigation must be given under oath and is subject to cross-examination by the accused and the counsel for the government. The accused has the right to offer either

sworn or unsworn testimony. If undue delay will not result, the statements of the witnesses who testified at the hearing should be obtained under oath. In this connection, the pretrial investigation officer is authorized to administer oaths in connection with the performance of his or her duties.

RULES OF EVIDENCE

The rules of evidence applicable to trial by court-martial do not strictly apply at the pretrial investigation, and the pretrial investigation officer need not rule on objections raised by counsel except where the procedural requisites of the investigation itself are concerned. This normally means that counsel's objections are merely noted on the record. Since the rules of evidence do not strictly apply, cross-examination of witnesses may be very broad and searching and should not be unduly restricted.

HEARING DATE

Once the prehearing preparation has been completed, the pretrial investigation officer should convene the hearing. The pretrial investigation is a public hearing and should be held in a place suitable for a quasi-judicial proceeding. Accused, counsel, reporter (if one is used), and witnesses should be present. Witnesses must be examined one by one, and no witness should be permitted to hear another testify.

POSTHEARING PROCEDURES

After the hearing is completed, the investigating officer prepares his or her report and submits it to the CO who directed the investigation. Figure 7-5 illustrates a completed investigating officer's report. The CO considers the investigating officer's recommendation as to disposition, but he or she need not follow it. The CO may dispose of the charges as he or she sees fit. If the CO deems a GCM is appropriate, but lacks the authority to convene such a court-martial, then he or she must send the report to the area coordinator, absent direction to the contrary from the OEGCMJ in his or her chain of command.

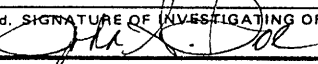
The report is sent with an endorsement that includes the recommendation of the officer directing the pretrial investigation, the recommendations of the

INVESTIGATING OFFICER'S REPORT <i>(Of Charges Under Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial)</i>						
1a. FROM: (Name of Investigating Officer — Last, First, MI) DOE, John A.		b. GRADE LCDR/ JAGC, USN	c. ORGANIZATION Naval Legal Service Office, Norfolk, VA		d. DATE OF REPORT 30 Aug CY	
2a. TO: (Name of Officer who directed the Investigation — Last, First, MI) DOOR, Walter T.		b. TITLE Commanding Officer		c. ORGANIZATION USS HERMITAGE (LSD 34)		
3a. NAME OF ACCUSED (Last, First, MI) PISTOL, Very C.		b. GRADE SN/USN	c. SSN 123-45-6789	d. ORGANIZATION USS HERMITAGE (LSD 34)		
e. DATE OF CHARGES 20 Aug CY						
(Check appropriate answer)					YES	NO
4. IN ACCORDANCE WITH ARTICLE 32, UCMJ, AND R.C.M. 405, MANUAL FOR COURTS-MARTIAL, I HAVE INVESTIGATED THE CHARGES APPENDED HERETO (Exhibit 1)					X	
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below)					X	
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d)(2), 502(d)					X	
7a. NAME OF DEFENSE COUNSEL (Last, First, MI) CRAFT, Hull		b. GRADE LT/JAGC/USNR	8a. NAME OF ASSISTANT DEFENSE COUNSEL (If any) N/A		b. GRADE N/A	
c. ORGANIZATION (If appropriate) Naval Legal Service Office Norfolk, VA			c. ORGANIZATION (If appropriate) N/A			
d. ADDRESS (If appropriate) N/A			d. ADDRESS (If appropriate) N/A			
9. (To be signed by accused if accused waives counsel. If accused does not sign, Investigating officer will explain in detail in Item 21.)						
a. PLACE N/A			b. DATE N/A			
I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED IN THIS INVESTIGATION BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL IN THIS INVESTIGATION.						
c. SIGNATURE OF ACCUSED N/A						
10. AT THE BEGINNING OF THE INVESTIGATION I INFORMED THE ACCUSED OF: (Check appropriate answer)					YES	NO
a. THE CHARGE(S) UNDER INVESTIGATION					X	
b. THE IDENTITY OF THE ACCUSER					X	
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31					X	
d. THE PURPOSE OF THE INVESTIGATION					X	
e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE					X	
f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED TO PRESENT					X	
g. THE RIGHT TO CROSS-EXAMINE WITNESSES					X	
h. THE RIGHT TO HAVE AVAILABLE WITNESSES AND EVIDENCE PRESENTED					X	
i. THE RIGHT TO PRESENT ANYTHING IN DEFENSE, EXTENUATION, OR MITIGATION					X	
j. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT, ORALLY OR IN WRITING					X	
11a. THE ACCUSED AND ACCUSED'S COUNSEL WERE PRESENT THROUGHOUT THE PRESENTATION OF EVIDENCE (If the accused or counsel were absent during any part of the presentation of evidence, complete b below.)					X	
b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL None.						
(INCLUDE IN STATEMENT REASON(S) FOR ABSENCE OF ACCUSED OR HIS OR HER COUNSEL)						
NOTE: If additional space is required for any item, enter the additional material in Item 21 or on a separate sheet. Identify such material with the proper numerical and, if appropriate, lettered heading (Example: "7c".) Securely attach any additional sheets to the form and add a note in the appropriate item of the form: "See additional: 7c."						

DD FORM 457
84 AUG

EDITION OF OCT 69 IS OBSOLETE.

Figure 7-5A.—Investigating Officer's Report, DD Form 457 (front).

12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH: (Check appropriate answer)				
NAME (Last, First, MI)	GRADE (if any)	ORGANIZATION/ADDRESS (Whichever is appropriate)	YES	NO
Boate, Paul T.	BM2, USN	USS HERMITAGE (LSD 34)	X	
Brush, Floss A.	BM1, USN	USS HERMITAGE (LSD 34)	X	
b. THE SUBSTANCE OF THE TESTIMONY OF THESE WITNESSES HAS BEEN REDUCED TO WRITING AND IS ATTACHED.			X	
13a. THE FOLLOWING STATEMENTS, DOCUMENTS, OR MATTERS WERE CONSIDERED; THE ACCUSED WAS PERMITTED TO EXAMINE EACH.				
DESCRIPTION OF ITEM	LOCATION OF ORIGINAL (If not attached)			
NAVPERS 1070/606 (Page 6)/IO(2) Record of Unauthorized Absence	Accused's Service Record PERSUPPET, Naval Station, Norfolk, VA		X	
b. EACH ITEM CONSIDERED, OR A COPY OR RECITAL OF THE SUBSTANCE OR NATURE THEREOF, IS ATTACHED			X	
14. THERE ARE GROUNDS TO BELIEVE THAT THE ACCUSED WAS NOT MENTALLY RESPONSIBLE FOR THE OFFENSE(S) OR NOT COMPETENT TO PARTICIPATE IN THE DEFENSE. (See R.C.M. 909, 916(h).)				X
15. THE DEFENSE DID REQUEST OBJECTIONS TO BE NOTED IN THIS REPORT (If Yes, specify in Item 21 below.)				X
16. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL			X	
17. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM			X	
18. REASONABLE GROUNDS EXIST TO BELIEVE THAT THE ACCUSED COMMITTED THE OFFENSE(S) ALLEGED			X	
19. I AM NOT AWARE OF ANY GROUNDS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. (See R.C.M. 405(d)(1).)			X	
20. I RECOMMEND:				
a. TRIAL BY <input type="checkbox"/> SUMMARY <input type="checkbox"/> SPECIAL <input checked="" type="checkbox"/> GENERAL COURT-MARTIAL				
b. <input type="checkbox"/> OTHER (Specify in Item 21 below)				
21. REMARKS (Include, as necessary, explanation for any delays in the investigation, and explanation for any "no" answers above.) (EXAMPLE OF MATTERS TO BE COVERED HERE.)				
1. Discussion of evidence, credibility of witnesses, and sufficiency of proof.				
2. Explanation of delays in completing investigation.				
3. Recommendations to dismiss, reduce, or otherwise change any specification/charge.				
4. Statement of any anticipated defense and any expected difficulties in proving any specification/charge on which trial is recommended.				
5. Any other recommendations.				
6. Any other matters which should be known to the convening authority and subsequent reviewing authorities.				
22a. TYPED NAME OF INVESTIGATING OFFICER		b. GRADE	c. ORGANIZATION	
JOHN A. DOE		LCDR	NAVAL LEGAL SERVICE OFFICE, NORFOLK, VA	
d. SIGNATURE OF INVESTIGATING OFFICER		e. DATE		
		80 Aug 84		

DD Form 457 Reverse, 84 AUG

Figure 7-5B.—Investigating Officer's Report, DD Form 457 (back).

investigating officer, a detailed and explanatory chronology of events in the case, and any comments deemed appropriate. A sample endorsement is shown in figure 7-6.

If the CO who ordered the investigation is also an OEGCMJ, he or she may refer the case to trial by GCM if he or she believes the charges are

warranted by the evidence and such disposition is appropriate.

Before a case is referred to a GCM, the CA's SJA must review the case and prepare a written legal opinion on the sufficiency of the evidence and advisability of trial. This written legal opinion is referred to as the pretrial advice and is shown in figure 7-7.

DEPARTMENT OF THE NAVY
Naval Education and Training
Program Management Support Activity
Pensacola, Florida 32509

17 April 19CY

FIRST ENDORSEMENT on LCDR Jack R. Frost, JAGC, USN Investigating Officer's
Report of 13 April CY

From: Commanding Officer, Naval Education and Training Program Management
Support Activity

To: Chief of Naval Education and Training

Subj: ARTICLE 32 INVESTIGATION ICO SEAMAN ABLE B. SEAMAN, USN,
111-11-1111

1. Forwarded.
2. Recommend trial by general court-martial.

PAUL T. BOATE

Figure 7-6.-Sample endorsement on an Article 32 investigating officer's report.

COMMAND LETTERHEAD

From: Staff Judge Advocate
To: (GCM Convening Authority)

Subj: UNITED STATES	}	
	}	ADVICE OF STAFF JUDGE
V.	}	ADVOCATE PURSUANT TO
	}	ARTICLE 34, UCMJ, AND
(RATE, NAME OF ACCUSED)	}	R.C.M. 406, MCM

Encl: (1) Charge sheet
(2) Art. 32 Investigation with forwarding letter

1. Purpose. The charge(s) in the above cited case have been received in this office for consideration and advice in accordance with the provisions of Article 34, Uniform Code of Military Justice, and R.C.M, 406, Manual for Courts-Martial, 1984.

2. Charges and specifications: See enclosure (1).

3. Prior Action.

a. On *, the Article 32 investigating officer submitted his report to Commanding Officer, * recommending trial by * court-martial on all offenses.

b. On *, Commanding Officer, *, concurred with the recommendations made by the investigating officer in the Article 32 investigation, recommending trial by * court-martial.

c. The Article 32 investigation and commanding officer's endorsement are attached as enclosure (2).

4. Discussion of Charge(s)

a. Elements: *

b. Discussion of proof: *

c. Maximum authorized punishment: *

d. Evidence presented at the Article 32 hearing established probable cause that the accused committed the offense(s) brought in Charge * and its/the specification, and as to each element of that/the charge.

5. Additional information

a. Service record information: *

b. Extenuating or mitigating circumstances: *

6. Conclusion.

a. The Article 32 investigation complies with Article 32 of the Code and R.C.M. 405 of the Manual for Courts-Martial.

Figure 7-7.—Article 34 advice of the staff judge advocate.

- b. All specifications are in proper form and allege offenses under the Code.

The allegations of all offenses are warranted by evidence adduced at the investigation.
{An allegation of offense is warranted if the evidence indicated in the report shows that there is probable cause to believe that the offense was committed, and that the accused is the person who committed it.}

- d. A court-martial will have jurisdiction over the accused and the offenses charged.

7. Recommendation. I recommend trial by * court-martial on all charges and specifications,

8. Action by Officer Exercising General Court-Martial Jurisdiction

a. You are empowered to refer the subject charges to any type of trial by court-martial, provided that you find:

(1) that the court-martial has jurisdiction over the accused and the offenses, and

(2) that each charge so referred alleges an offense under the Code and is warranted by evidence indicated in the report of investigation.

- b. You may dispose of the case under Article 15, UCMJ.

- c. You may dismiss the charge(s) and specification(s) entirely.

d. As a general rule, a charge should not be referred for trial unless such disposition is considered clearly necessary and, if tried at all, should be tried by the lowest court with power to adjudge an appropriate and adequate punishment.

e. An endorsement on the charge sheet implementing the recommendation made above is attached for signature if you desire to effect such disposition. Otherwise, appropriate action will be prepared to effect any other disposition that you may desire.

Very respectfully,

SJA's NAME, RANK

DIRECTION OF THE CONVENING AUTHORITY

- 1. All opinions and recommendations of the staff judge advocate are approved.
- 2. Trial by general court-martial is directed.

GCM CA NAME
RANK, ORGANIZATION
TITLE

Figure 7-7.—Article 34 advice of the staff judge advocate-Continued.

The advice of the SJA includes a written and signed statement that sets forth that person's opinions regarding the following:

- Whether each specification on the charge sheet alleges an offense under the UCMJ
- Whether each allegation is substantiated by the evidence indicated in the Article 32 report of investigation
- Whether a court-martial would have jurisdiction over the accused and the offense(s)
- The action to be taken by the CA

The SJA is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence to render the advice. Another person may prepare the advice, but the SJA is responsible for it and must sign it personally.

The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter and endorsements, and report of investigation are sent along with the pretrial advice. In addition, the pretrial advice should include, when appropriate, a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; and any previous recommendations, by commanders or others who have forwarded the charges, for disposition of the case. There is no legal requirement to include such information and failure to do so is not an error. Lastly, it should be noted that the legal conclusions reached by the SJA are binding on the CA whereas the recommendation is not.

THE GENERAL COURT-MARTIAL TRIAL

A GCM may try any person subject to the Code for any offense made punishable under the Code. GCMs also may try any person for a violation of Articles 83, 104, and 106. Upon a finding of guilty of an offense made punishable by the Code, GCMs may, within limits prescribed in the MCM, adjudge any punishment authorized under R.C.M. 1003. The death penalty may not be adjudged if not specifically authorized for the offense by the Code or the case has been referred as noncapital. The GCM composed only of a military Judge does not have jurisdiction to try any person for any offense for which the death penalty

may be adjudged unless the case has been referred as noncapital. In essence, this means the death penalty may not be imposed by a military judge, it must be imposed by a court composed of members.

TRIAL PROCEDURES

As you have just learned, there are prerequisites to convening a GCM. Once an Article 32 investigation has been conducted and a case is referred to a GCM, the actual procedure of the trial is the same as that of an SPCM. However, there are some differences between a GCM and an SPCM in composition and qualification of parties.

A GCM is composed of a military judge and not less than five members or except for in capital cases a military judge alone, if requested and approved.

The military judge of a GCM is designated for such duties by the Judge Advocate General, certified to be qualified for duty as a military judge of a GCM and is assigned and directly responsible to the Judge Advocate General.

There is no difference in the qualifications of any person who may be assigned to act as a member in a GCM. The only difference is that there must be a minimum of five members appointed. If the accused elects to be tried by a court composed of enlisted members, then the GCM must consist of at least two enlisted members.

As in an SPCM, a DC or associate DC must be certified under Article 27(b), UCMJ, to perform the duties of DC at a GCM. However, unlike the SPCM the TC only need be a commissioned officer, in a GCM the TC must be a person certified by the Judge Advocate General under Article 27(b) to perform such duties.

SUMMARY

This chapter has given you the insight needed to understand how summary, special, and general court-martials work. As a Legal man you will be involved in court-martial proceedings whether it is from the convening authority level or at a NLSO where you will be involved in some aspect of the trial proceedings itself. The information found in this chapter should become second nature to you as you gain experience in the Legalman rating and process cases for court-martial.